The references to the pages of the Record are to the marginal figures.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

San Diego Land and Town Company,
Appellant,

v.

City of National City et al.,
Appellees.

APPELLEES' BRIEF.

I.

Constitutionality of California Statutes and Constitution.

The right of the City defendant to fix water rates is conceded.

Article XIV Calilornia Constitution provides: (Brief p. 7.)

"Section 1. The use of all water now appropriated or that may hereafter be appropriated, for sale, rental or distribution, is hereby declared to be a public use; and subject to the regulation and control of the State in the manner to be prescribed by law; *provided*, that the rates of compensation to be collected by any person, company or corporation in this State, for the use of water supplied to any city and county, or city or town, or the inhabitants thereof, shall be fixed an-

nually, by the Board of Supervisors, or City and County, or City or Town Council, or other governing body of such city and county, or city or town, by ordinance or otherwise, in the manner that other ordinances or legislative acts or resolutions are passed by such body, and shall continue in force for one year and no longer. Such ordinances or resolutions shall be passed in the month of February of each year and take effect on the first day of July thereafter. Any board or body failing to pass the necessary ordinances or resolutions fixing water rates where necessary, within such time, shall be subject to peremptory process to compel action at the suit of any party interested, and shall be liable to such further process and penalties as the legislature may prescribe. Any person, company or corporation collecting water rates in any city and county, or city or town in this State, otherwise than as so established, shall forfeit the franchises and water works of such person, company or corporation to the city and county, or city or town where the same are collected, for the public use."

"Section 2. The right to collect rates or compensation for the use of water supplied to any county, city and county, or town, or the inhabitants thereof, is a franchise, and cannot be exercised except by authority of and in the manner prescribed by law."

And Sections one and two of the Act of March 7th, 1881, are as follows:

"Section 1. The Board of Supervisors, Town Council, Board of Aldermen, or other legislative body of any city and county city or town, are hereby authorized and empowered, and it is made their official duty to annually fix the rates that shall be charged and collected by any person, company, association or corporation, for water furnished to any such city and county, or city or town or the inhabitants thereof. Such rates shall be fixed at a regular or special session of such Board or other legislative body, held during the month of February of each year, and shall take effect on the first day of July thereafter, and shall continue in force and effect for the term of one year and no longer."

"Section 2. The Board of Supervisors, Town Council, Board of Trustees or other legislative body of any county, city or town, are hereby anthorized, and it is made their duty, at least thirty days prior to the 15th. day of January of each year to require by ordinance or otherwise, any corporation, company or persons supplying water to such county, city or town or to the inhabitants thereof, to furnish to such Board or other governing body in the month of January of each year, a detailed statement verified by the oath of the president and secretary of such corporation or company or of such person, as the case may be, showing the name of each water rate payer, his or her place of residence and the amount paid for water by each of such water payers during the year preceeding the date of such statement and also showing all revenue derived from all sources, and an itemized statement of expenditures made for supplying water during said time."

The respective rights, duties and obligations of the supplier and the

governing power are set out in the Constitution and the legislature has added certain details and methods of observance and enforcement.

Certain sections, 858, 861 and 865 of the Municipal government act are set out in the answer (Record 42, 43).

Ordinance 94 of National City fixed the time and place of meeting of the City Board (Record 43).

Appellant contends in brief that the State Constitution not providing for personal notice of the time and place of hearing, and for the details and minutae of a trial, this court will declare it a nullity in the face of the Federal Constitution, and the acts of the State under it void.

This Court will not lightly sweep from existence a provision of the Constitution of a sovereign state, or declare its statutes a nullity.

The law of notice is set out in the Illinois Railroad Tax cases, 92 U. S. 575. The law as to notice was declared by Justice Miller with a unanimous Court on page 609;

"There is however an objection urged to the conduct of the Board of Equalization in which they are charged with a gross violation of the law to the prejudice of the corporation. * * * It is charged that the Board of Equalization increased the estimates of values so reported to the Auditor without notice to the corporation, and without sufficient evidence that it ought to be done. It is strenously urged on us that for the want of this notice the whole assessment and levy of taxes is void. It is hard to believe that such a proposition can be seriously made. * * * If a railroad company is by law entitled to such notice, surely every individual is entitled to it. Yet if this be so, the expense of giving notice, the delay of hearing would render the main exercise of the functions of this Board impossible. The very moment you come to apply to the individual the right claimed by the corporation in this case, its absurdity is apparent. This Board had its time of sitting fixed by law, etc."

The same questions are settled in the Kentucky Tax cases, 115 U. S. 321. In that case, page 333, in speaking of notices, hearing etc. the Court said:

"This statement made by the corporation through its officers is the statement of its own case, in all the particulars that enter into the question of the value of its property, and may be verified and fortified by such explanations and proofs as it may see fit to insert. It is laid by the Auditor before the Board of R. R. Commissioners, and constitutes the matter on which they are to act. They are required to meet for that purpose on the first day of September of each year at the office of the Auditor at the seat of government. * * These meetings are public and not secret. The time and place for holding them are fixed by law."

This Court in 140 U. S. 316, in the San Francisco Street improvement cases which went up from California (Lent vs. Tillson) commented on the prior cases and after declaring (p. 328) that the acts were not repugnant to the requirement of due process of law, said:

"If we had any doubt of the correctness of these views we should accept the interpretation which the highest Court of the State places upon the statute. When the inquiry is whether a state enactment under which property is proposed to be taken for a public purpose accords full opportunity to the owner at some stage of the proceedings to be heard as to their regularity or validity, he must assume that the inferior Court and tribunals of the state will give effects to such enactment as interpreted by the highest Court of that state." and then quotes the Supreme Court of California construeing the statute and follows the State Court.

The Indiana Railroad Tax Law is in 154 U. S. 421 (P. C. C. & St. L. R. R. vs. Backus.) Still later upheld by this Court.

The strongest case in this state is the one in 82 Cal. 286. Spring Valley Water Works vs. San Francisco Co. which is commented upon in the opening brief and in which appellant's leading counsel, then on the supreme bench delivered the opinion of the Court.

Counsel in the case at bar labors to bring his opinion in 82 Cal. within the Minnesota case passed upon by this Court in 134. U. S. 418.

The Minnesota Court authoritatively declares that the rates fixed under its statute are in all respects final and conclusive, and the rates established by the Commission are the only ones that are equal and reasonable, and that no inquiry can be had as to them in that respect. That although the Commission is required to fix rates that are just and reasonable, yet if they choose to establish rates that are not equal and reasonable there is no power in the Courts of Minnesota to stay the hands of the Commission, and compel them to obey the law, and this Court says:

"This being the construction of the statute by which we are bound in considering the present case we are of the opinion *that so construed* it conflicts with the constitution of the United States in the particulars complained of" (appellant's brief p. 13.)

No such conditions obtain in the case of the California constitution or statute as construed by the California Court.

The case referred to by appellant (82 Cal.) was decided on demurrer; and the defendants therein stood on the demurrer,relying on their contention that the Supervisors, the governing body of the City of San Francisco were entirely beyond judicial control after having fixed the rates, and their action was final. That the Courts had no jurisdiction

whatever (p. 287 case.) That the judicial arm of the government could not interfere with constitutional functions of any other department of the state government. That the Courts could not interfere with a municipal corporation clothed with constitutional power so long as it keeps in the limits of its jurisdiction and is guilty of no fraud or corruption. (p. 288) In short the defendants there took the position assumed by the Minnesota Court in 134 U. S. and which is epitomized by Justice Blatchford as quoted in appellant's brief herein (p. 13.) This position appellant seeks to fasten on the California Court in the Spring Valley case quoted on page 15 of its brief. The decision not only does not take that position but puts the California Courts in construing our constitution and statutes directly opposed to the Minnesota authority.

Our Court says in this case:

"The appellants take a broad ground that the Constitution has conferred on the board of Supervisors the absolute and exclusive right to fix water rates, and that under no circumstances have the Courts any jurisdiction to interfere with or control such authority. While the respondent contends that there is a limitation on the power of the Board which compels the Board to fix *reasonable* rates or compensation, and that whether the rates or compensation are fixed by such Board are reasonable or not the Courts have power and jurisdiction to determine (p. 303). There is no force in the contention that there is no jurisdiction vested in the Superior Courts to determine the issues. (p. 304-5). * * * The whole gist of the complaint is that the Board of Supervisors * * * have arbitrarily, without investigating, and without any exercise of judgment or discretion, fixed these rates without any reference to what they should be, without reference to the expense of the plaintiff necessary to furnish the water, or to a fair compensation therefor (p. 305-6). (Then comes the quotation in appellant's brief) (p. 15). * * * The fact that the right to store and dispose of water is a public use subject to the control of the State, and that its regulation is provided for by the State Constitution does not affect the question. Regulation as provided for in the Constitution does not mean confiscation or taking without just compensation. If it does, then our constitution is clearly in violation of the constitution of the United States. The ground taken by the appellant is that the fixing of rates is a *legislative* act; that by the terms of the Constitution, the Board of Supervisors are made a part of the legislative department of the State government and exclusive power given them which cannot be encroached upon by the courts, * * * but whether it is judicial, legislative or administrative is immaterial. Let it be which it may, it is not above the control of the courts (p. 307). * * * We are not inclined to the doctrine asserted by the appellant in this case, that every subordinate body of officers to whom the legislature delegates what may be regarded as legislative power, becomes thereby a part of the legislative branch of the state government and beyond judicial con-

trol is not, nor is any part of it true, when applied to a subordinate municipal body, which though clothed to some extent with legislative and even political powers, is yet in the exercise of all its powers *just as subject to authority and control of courts of justice to legal process, legal restraint and legal correction, as any other body or person, natural or artificial.* (p. 311 et seq)."

Following the last quotation in appellant's brief (p. 15) on the question of notice, the Court further said:

"It does not follow however, that because no notice is necessary, the Board are for that reason excused from applying to corporations or individuals interested to obtain all information necessary to enable it to act intelligently and fairly in fixing the rates. This is a plain duty, and a failure to make the proper efforts to procure all necessary information from whatever source may defeat its action."

A full reading of this opinion, which is the chief basis for asking this Court to annul the Constitution and Statutes of California, will show that they as construed by the State Supreme Court (and this Court will adopt the State Court's construction) will show that we have no such provisions as promulgated by the Minnesota legislature and Courts. Justice Works was too good a jurist then to commit California to such a doctrine, and he is too good a lawyer now to contend that he did so.

The long list of citations by appellant in subdivision I of argument as to "due process of law," "opportunity to be heard" and the arbitrary power delegated to municipalities with no resort by the party aggrieved to any judicial tribunal (p. 7, 8, 9, Brief) are not material, for no such premises as they argue from exist under our Constitution and laws as construed by our Courts.

The Constitution and laws of California are notice of the time of fixing rates upon which the complainant here was bound to act. The resolution of the City Trustees calling for the statement required by the Section 2 of the Act of March 7th., 1881, and the sevice of same on complainant gave the latter notice of the City's intention to proceed under the law. The case at bar differs materially from the Minnesota case, inasmuch as the complainant had notice that the city would fix the rates and had an ample opportunity to be heard before the Board of Trustees as to the reasonableness of the proposed water rates. It did in fact, appear both before the Committee of the Board of Trustees having the matter in charge before the ordinance was introduced and also, before the same Committee on the day it was up for final passage; and afterwards before the full Board of Trustees when the ordinance was finally being considered and passed.

There was no refusal to hear or to examine evidence offered by or on

behalf of complainant, as there was in the Minnesota case; but on the contrary the Board of Trustees heard and considered all the evidence, including the defective statement that was offered by complainant. And if the Board erred in its judgment in fixing rates so unreasonably low as to amount to constructive fraud, which we do not admit, there is relief in the State Courts, the lack of which relief is the basis of appellant's contention of the unconstitutionality of the State regulations.

Besides the distinction made in the case of rates directly fixed by an Act of the Legislature and not by a commission to whom the Legislature delegated that power as in the Minnesota case, does not apply here, because the power of the Board of Trustees of National City is derived directly from the State Constitution.

Art. 14, Sec. 1, Supra.

which has been held to be self-executing (82 Col. 286).

The Statute of March 7th, 1881, p. 54, simply regulates the exercise of such power, and adds nothing to that granted directly by the Constitution of the Board of Trustees of the City.

The record here shows that the appellant had all the rights declared in 134th U. S. and exercised them. It had actual notice and acted upon it. Mr. Boal was the general manager (Record 81.) He knew of the action of the Board on the ordinance 118 (Record 93.) Notice was handed him as an officer of the company and a statement of the Water Co. expenditures was prepared and handed the Board (Record 93-4.) The Company notified the City of a desire to increase rates that year (Record 102.) The trustees, the company and water consumer, met and discussed it (Record 103-4.) The Company proposed an advance on water rates to the City Board (Record 105.) and admits in the record that a notice was communicated to it by the City Board (Record 496.) That it was served on an officer(Record 497.) that it filed a statement (Record 498) and the Board discussed it (Record 499) with the statement as a basis (Record 500,) and officials of the company were there (Record 501.) Explanations were made regarding it Record 503.) Routson, one of the trustees, states that the question was discussed (Record 509,) and details the history of prior ordinances when officers of the company were also members of the City Board (Records 512, 513, 515) and the rates as fixed in the ordinance in question were about the same as prior years. (Record 520, last answer) and there was a slight increase in this ordinance on the irrigation rates (Records 522 & 527) from $3.50 to $4.00 per acre and from 1½ to 2 cents meter rates. The Vice President and General Manager attended

these conferences and stated the wishes of the Company and discussed them (Records 531-532-533-534.) and the Board considered the adopted rates reasonable (Record 535.)

The rates were practically the same as had been in force for years and practically the same rates as when the Company's officials were also among the members of the City Board (Ordinance 118, the one in suit, Rec. 6; Ordinance 107, Rec. 598; Ordinance 112, Rec. 603).

It is true the Company may not have been present at the final conference, or when the actual vote was taken, or may have been, But a party after a hearing in an ordinary action is deprived of no rights because he does not go into the jury room and take part in their conference, or retire with the chancellor when he enlightens his judgment from the briefs presented, or his own meditations.

The Circuit Court found as a fact (Rec. 76, appellant's brief p. 3) that the ordinance would yield a fair interest on the National City investment, and as much as the ordinances hitherto approved by the Company, save the new demand for a "Water Right;" and the Courts are slow to disturb the findings of inferior Courts on questions of fact.

II.

Appellant complains that the Circuit Court did not pass upon its contention as to the California Constitution and Statutes being obnoxious to the federal Constitution.

We are content to adopt the reasoning of the learned jurist in the Court below. But as we maintain as the position of the appellant on the constitutional question is wholly untenable. it makes no difference whether the Circuit Court directly passed upon the proposition. If as a matter of law the California regulations are constitutional, it can make no difference whether the Circuit Court disregarded appellant's contention because it was wrong, or because the Company was estopped from urging it by its own act, in having as a foreign corporation come into the state and claimed the benefits and protection of the very provisions it now seeks to annul.

III.

The Charge for Water Rights.

The water of this state belongs to the public and the use of all water now, or hereafter to be appropriated, is a public use and subject to State control, (Art. XIV, Sec. I, State Constitution, Rec. 64). The company appellant did not and cannot acquire any title or ownership

in it. The water and its use remain in the public subject to the rights of the Company to carry and deliver it to consumers at rates fixed in the manner prescribed by law.

Every right in it that is not expressly delegated to the Company remains in the public. No right can be delegated by implication.

A private person may under our laws appropriate the water of a stream, and the right to use it for purposes contemplated by law be personal to himself. He can only hold as much as he himself uses (Civil Code Cal. Secs. 1410-1422).

The cases cited by appellant in this state (brief p. 23) from the 80th. and 87th Cal. presented no such question as in this case. In the Fresno cases it does not appear that the water was appropriated by the canal company by virtue of the Constitution and laws of California. But that issue was in Wheeler vs. North Colorado Co., reported 17 Pac. 487 aud liberally cited in Lanning vs. Osborne, 76 Fed R. 319.

The Colorado Constitution provided, Art. 16, Secs. 5, 6, 7, 8, that all unappropriated water was the property of the public, and provided for priorities, and for rights of eminent domain and for fixing of rates by county commissioners; provisions very similar to the California Sections. (76 Fed. 330, supra). The irrigation company demanded an additional sum over the annual rates for a water right (p. 331) which the Colorado Court held unlawful under the constitutional provisions (76 Fed. 331-2, supra).

In Price vs. Riveside Co., 56 Cal. 431 it is held that companies similar to the appellant are compelled to furnish water to all in the community for whose alleged benefit in was created, and cannot evade the obligation by asserting the right to apply all the water to its own use or to those of its grantees. (Cited and commented on 76 Fed. 332, supra).

In People vs. Stephens, 62 Cal. 209, (cited 76 Fed. 333, supra) the Court said of the California constitutional provision:

"By Sec. I, Art. XIV, the use of all water appropriated for sale, rental and distribution is expressly declared a public use. * * * The Constitution declares it to be such and then makes the use subject to the regulations and control of the legislature in the manner prescribed by law, subject to certain enumerated provisions contained in the constitution itself; among them to provision in respect to rates or compensation to be collected by any person, company or corporation for the use of water supplied to any county, city or town or the inhabitants thereof. Such rates or compensation the Constitution expressly declares shall be fixed in a certain specified manner, at a certain time

and by a certain body; and the body failing to do so is expressly made subject to a peremptory process to compel action. But by the next section of the same article of the Constitution the right to collect the rates or compensation so established is declared to be a franchise, and cannot be exercised except by authority and in the manner prescribed by law; that is by statute law. But of course the Constitution contemplated the enacting by the legislature when they did not exist, of all laws necessary to give effect to its commands, and that none be passed in contravention of its provisions. When, therefore, the Constitution fixed the manner of establishing the rates or compensation to be charged for water furnished to any county, city or town or the inhabitants thereof, and further declared that the right to collect the rates or compensation so established is a franchise and cannot be exercised except by authority of and in the manner prescribed by law, it was the duty of the legislature, if they did not exist, to provide needful laws."

The Circuit Court further said (76 Fed. 334, supra);

"It is impossible to reconcile the declaration of the Supreme Court of California in either of the two cases last referred to or in any other case to which my attention has been called with a right on the part of the corporation appropriating water under and by virtue of the Constitution and laws of California for sale, rental or distribution, to exact any sum of money, or other thing in addition to the legally established rates, as a condition upon which it will furnish consumers water so appropriated. In a very late case of Merrill vs. Irrigation Co. 44 Pac. 720 (112 Cal. 426), the Supreme Court of California held that the provisions of Sec. I, Art. XIV, of the Constitution of that State apply to all water designed, set apart and devoted to purposes of sale, rental or distribution without reference to the mode of its acquisition * * * (p 334). It has already been seen from the reference made to the cases of Price vs. Irrigation Co. 56 Col. 431 and Merrill vs. Irrigation Co. 112 Cal. 426 that the right of the consumers to demand of the corporation a supply of water presupposes a sufficient supply of water for the purpose under the control of the Co. and by the provisions of Section 552, Civil Code of California, a consumer whose right is once vested is protected from the injury of having his supply cut off, for it in terms declared him entitled to the continued use of the water upon payment of the rates established as required by law, necessarily growing out of his right to prevent, by injunction, if need be, the distribu or from disposing of or attempting to furnish beyond the capacity of the supply, thereby imperiling the rights of those already vested. So long however as a sufficient supply exists, every person within the flow of the system has the legal right to the use of a reasonable amount of the water upon the payment of the rate fixed for supplying it."

Section 552, Civil Code of California, is:

"Whenever any corporation, organized under the laws of this State, furnishes water to irrigate lands which said corporation has sold, the

right to the flow and use of said water is and shall remain a perpetual easement to the land so sold, at such rates and terms as may be estsblished by said corporation in pursuance of law. *And whenever any person who is cultivating land on the line and within the flow of any ditch owned by such corporation, has been furnished water by it with which to irrigate his land, such person shall be entitled to the continued use of said water, upon the same terms as those who have purchased their land of the corporation.*"

When a water corporation has appropriated water under the constitutional provisions, it has the water as an agent of the state, for that portion of the public which is so situated as to be able to use the water, and those who are so able to use it, within the capacity of the Company's ability to supply, have as high a property in the right to use the water as if they had appropriated themselves.

Price *v.* Riverside Co. 56 Cal. 431.

McCary *v.* Beaudry 67 Cal. 120.

In the latter case the Court said:

"Whenever water is appropriated for distribution and sale the public has a right to use it. That is, each member of a community. by paying the rate fixed for supplying it, has a right to use a reasonable quantity of it in a reasonable manner. Water appropriated for distribution and sale is *ipso facto* devot d to a public use, which is inconsistent with the rights of the person so appropriating it to exercise the same control over it that he might have exercised if he had never appropriated it."

Complainant concedes that where water is once furnished for irrigation it becomes annexed to the land as an easement. And it has been shown by the evidence (Ex. 4), 747 acres of land and a number of lots in National City are irrigated and in consequence the easement for water supply was attached thereto.

There is no difference in princi le in this regard, where wate r is furnished for domestic use to the occupants of premises consisting of acreage property or city lots. For after the water is furnished for such purposes, the corporation must continue to supply it at rates fixed in accordance with law as long as it has the ability to do so.

And as this is so, it follows that the right to be so supplied attaches to the premises occupied and not to the occupants, and makes the right to have water supplied for domestic purposes on such premises as much of an easement, as in case of premises supplied for irrigation, which obtain the easement by force of the Statute.

Cal. Civil Code, 549, 552.

Therefore where water is furnished to the inhabitants of a city for irrigation and domestic use, the owners of the premises to which the right to be supplied attaches, in view of the public character of the water supplied under the State Constitution, become owners of an easement in the plant of the water company, in the nature of that of tenant in common, the same as if they, instead of the corporation, exercised their individual right to appropriate the water in the first instance, and join together in the construction of the plant as appears to have been done in

McFadden *v.* Board of Supervisors, 74 Cal., 571.

The water corporation simply becomes the owner, so far as the water is concerned, of a franchise, that is, the right to collect such tolls as may be fixed in accordance with the Constitution and laws of the State, and may, in furtherance of such use, exercise the right of eminent domain.

The "use" which the Constitution declares to be public applies, by the terms thereof, to the water alone, but in order to exercise this use it was necessary for complainant, as a corporation with power of eminent domain, to acquire reservoir site and rights of way and to construct its reservoir and plant so constructed by it is private property, yet it is affected with public interest.

Munn *v.* Illinois, 94 U. S., 113.

Budd *v.* New York, 143 U. S., 517.

Welch *v* County of Plumas, 80 Cal., 341

The right of the public to use public railways telegraph and telephone lines, or public elevators or warehouses, or illuminating gas or electricity furnished to the public, does not depend on the pre-payment or any payment of a bonus to the corporation in charge of such public uses or any of them, to reimburse it for the outlay made in constructing the railroad, telegraph or telephone lines, elevators or warehouses, gas or electric plants. But as they are all affected with the public interest, the rates and compensation allowed to them are subject to regulation and control by the State. And in each of the latter cases, the property that is impressed with the public use is private, and does not consist in part of wholly public property, like the water furnished and supplied by complainant. Consequently, there is less reason for allowing a water company a bonus in the shape of a "water right" to reimburse it for the outlay it made to make the use of public water available, than in the case of the other corporations referred to in

charge of public uses, which corporations, it will borne in mind, furnish everything that is impressed with the public interest, for the benefit of the public.

And in none of the cases involving the reasonableness of rates as applied to any of the above mentioned corporations, was it urged or suggested that the public should pay a bonus in addition to the rates which should reimburse the outlay made for the plant impressed with the public use, consequently it will not do for the complainant to say that because the California Constitution does not in the franchise to collect rates for compensation allow a bonus for a "water right," that it is therefore repugnant to the Federal Constitution, in that it deprives complainant of its property without compensation.

It is a very important consideration that the elements and natural laws supply the water and the complainant simply collects tolls on it as it flows through the reservoir and distributing plant, and in consequence is deprived of nothing.

If the framers of the constitution had contemplated the sale of water rights by corporations supplying the public with water in this State, in addition to the rates and compensation provided for in the Constitution, it would have provided in apt words therefor. But it is to be perceived, as conceded by complainant's counsel, that no such provision was made or contemplated in that fundamental law. Then how can a bonus for a water right be exacted, when the right of compensation is fixed as a franchise, which does not include water rights?

This being the case, the appellant being in charge of this public use for the benefit of the public must be held under the Constitution to have acquired its right to use the water for such profit or compensation as might be fixed in accordance with the State Constitution; and to have made its expenditures for its plant, to avail itself of such use, under and in accordance with such Constitutional limitation; consequently it cannot charge for a water right so called, in addition to the compensation provided for by the Constitution, nor can the City Government of National City allow it to fix the the price for such a water right, or provide charge therefor.

If the law were otherwise it would not work a hardship in the case to deny the right, because complainant appropriated the water and put in its plant primarily for the purpose of disposing of its own lands, and which, as we shall endeavor to show hereafter, received a large portion, if not all, of the original cost of its plant back through lands sold by it, the value of which lands was enhanced by the connection of the water therewith, as conceded by appellant.

In what situation does the appellant's contention as to the Water Right place it?

Suppose a water company sells water rights amounting in acreage acquiring such rights to the entire capacity of its system. The owners of the land have the right to have held for their use that amount (being all the water) and the water company has no right to dispose of it to other consumers. The owners of the land do not take the water and pay the annual rates, but conclude not to improve their lands but still hold the water rights. The business and income of the Water Company is destroyed. It cannot resell the right, and if it ventures to supply other takers they thereby acquire easements under Sec. 552 and endless conflict is consequent.

Appellant's counsel say, (brief p. 23):

"The Constitution has nothing whatever to do with a water right or the price that shall be paid for it. It simply provides for fixing the annual rental to be paid for the water furnished and used. When he obtains his water right, he has a right to demand that the water shall be furnished to his lands at the price fixed as provided by law and the Company shall exact no more.

Whether in fixing annual rates to be charged, the body authorizes to fix them can take into account the amount that has been received by the Company for water rights is another question and is not presented in this case. Nor is any question raised as to what would be a reasonable amount to exact for a water right, or whether the Courts can interfere to determine what is a reasonable amount thereof."

Then why ask this or any other Court to pass upon it? If the Constitution and statutes do not have anything to do with a water right, or the price to be paid for it, the City defendant had no right to base the rates on it, and the ordinance is not void for a failure to do so. If it is a question between the Company and those to whom it sells such rights alone, and the Constitution and the regulations under it have nothing to do with the price to be charged then, the legislative body of this town could make no valid ordinance regarding them, and any decree the Circuit Court had made would have been of no effect, for the individual purchasers of such rights were not parties to the suit, and could not have been bound by the decree; and a finding such as appellant desired had availed it nothing. Appellant may as well have asked the Court to have granted relief concerning the sales of its lands or to take into consideration the fluctuating value thereof. All that this Board of Trustees could do was to fix the rates for one year for the use of water. Its powers were restricted, and to be strictly construed, like all others of limited jurisdiction.

The Board of City Trustees declined to allow the element of water rights to enter into the fixing of the annual rates. The Court said there was, in law, no such thing as a water right for which the Company was entitled to charge in addition to rentals. The appellant says in its brief (p. 23) the State regulations have nothing to do with it, but claims in effect that the City cannot fix rates save where the water right is first acquired. As well might the City require that the rates apply only to those who have certain rights in the lands to be irrigated, by title, lease or otherwise; or take cognizance of any other private relations of the water taker. We agree with the Circuit Court that there can be no charge in addition to the rentals, and we also agree with the appellant that 'the Constitution of the State has nothing whatever to do with a water right, or the price that shall be paid for it," and that therefore it is no element in fixing rates.

IV.

Basis on Which Rates Should be Allowed

Appellant's contention it should be allowed rates that will yield an income for its actual and necessary operating expenses and repairs to make good the natural depreciation of the plant, and in addition a reasonable rate of interest on the amount actually and reasonably invested in the plant; and that the interest be allowed over and above operating expenses, maintenance and depreciation, and in no event the interest to be less than the amount paid by the Company as interest on its bonds, provided neither the amount borrowed or the interest thereon is excessive (Appelts. Brief p. 27 and 36).

These rates are provided by the Constitution and State Statutes, and are construed by the State Courts, and in so far as the State Supreme Court has passed upon them, its construction should be adopted.

Appellant's argument appears to assume a condition where a water company is delivering water to its full capacity, and where it is the only organization or water supplier able to, or with the right to, deliver water to the territory or the people involved. Exhibit 4 (Record 594-596) shows the amount of land in acreage that can be supplied by this system, and also the amount actually being supplied, both in the defendant City's limits, and in the entire territory under the system.

The total acreage being irrigated inside National City is 747 acres; outside territory 3148, a total of 3895 acres.

The total amount that can be covered by the system below the 140 foot contour (not including marsh lands which cannot be considered) is

in National City 2542 acres and outside territory 7411 acres, an aggregate of 9953 acres. Of this amount the Company owned in the City originally 685 acres and in outside territory 4514 acres, in all 5199 acres.

This statement was rendered by the general manager of the Company (Record 107). He states that the acreage that can be supplied by the system as then constructed does not exceed 6,000 acres, (Record 107) but that if it is found in the future the people can grow their orchards on less water per acre, the serving capacity will be increased (Rec. 116). The testimony of the Company's engineer shows that this 6,000 acres estimated on a basis of 365 days irrigation while the actual use is about 200 days (Rec. 225 et seq. & 245). Under certain conditions the system was estimated to be able to supply 20,000 acres; (Rec. 254-5-6-7) but that was likely an extravagant estimate. The capacity above 6,000 depends on the elevation and the manner of delivery. (Co. engineer's testimony, Rec. 263).

These different estimates show that the system can serve from 50 to 100 per cent more acreage than at present. Nor is there any evidence as to what other "persons, companies or corporations" can furnish this territory, or any of it, with water.

The law does not contemplate that water shall be supplied to a municipality or its inhabitants by one person, company or corporation alone. It provides for no monopoly or exclusive franchise in this respect.

Statutes of March 7th., 1881, Civil Code of California, provides:

"Sec 6—Rates for the fixing of water shall be equal and uniform. There shall be no distinction made between persons, or between persons and corporations, or as to the use of water for private and domestic, and public or municipal purposes; provided nothing herein shall be so construed as to allow any person, company, association or corporation to charge any person, corporation or association anything for water furnished them, when by present laws such water is free."

This is a part of the same Act frequently quoted in the record and briefs.

Different persons or companies may be delivering water to the same municipality or the inhabitants. One company may not be able to supply all the water needed. Some other company may be delivering water to those points too high to be reached by another one. One system may have been put in at large cost as this appellant's, and another may take the water from a flowing stream, and conduct it in

open ditch at comparatively small expense. Different systems may supply different parts of the same town and may have cost vastly different amounts. How would appellant reconcile his position with such conditions under this law that declares rates must be uniform? The growth of cities and towns and their physical conditions will compel the acquirement of water supplies from different systems, and these hypothetical conditions cannot be disregarded, nor rules laid down that must be afterwards abandoned. These Water Companies that are but beginning to supply with a part of their capacity cannot be allowed to prohibit water use in young and growing territory by fixing full fledged rates on the basis of full capacity of the system supplying all the territory it can cover.

This Court has established a fairer and a more equitable rule.

The Court in Reagan vs. F. L. & T. Co. 154 U. S. 412 declares that the failure to provide a profit to the investor is not conclusive that the tariff was unreasonable. The time of the construction, extravagance, mismanagement, the building in excess of business demands, and other things affecting the rights of the community,the Court says, may be circumstances justifying the tariff.

A railroad built into a sparsely settled country that has but little freight to ship out, and it may have been economically built and equipped, but it could not be allowed to fix rates on its cost price that would compel the few shippers to produce an income on that cost, or refrain from shipping on it. It may start from a growing and populous city with faith in the growth and developement of the locality, may build double tracks, erect great round houses and fill them with dozens of engines in anticipation of future demand, but it cannot be allowed to demand rates that will return an income on this investment simply because it is providing for future growth, or because the judgment of its promoters has been at fault as to the demand or production.

A water company, when it engages in the business of supplying water, takes the same chances as a gas or transportation company of having its property fluctuate in value; and also of getting sufficient patronage to make the business engaged in remunerative. And if, as in the present case, the water company finds that it has miscalculated its ability to supply consumers,and there is a lack of purchasers for its lands, and its water plant, in consequence, depreciates in value, it is not the fault of, nor to be charged to, its consumers. According to appellant's contention, in this regard, no change of condition affecting the company as well as consumers, no lapse of time, could make any

difference in the basis of rates; the statement of which is enough to refute it, and to dispose of the objection.

No injustice will be done in taking, and the Court should take, the present value of the plant into consideration in testing the ordinance in question.

We say the reasonable position is that the cost of the plant, its present value, the amount of demand, and the volume of the business to be supplied and the ability of the consumers to pay, and probably other things, are all proper elements to be considered in fixing rates just, fair and reasonable to both supplier and consumer. No hard and fast rule ought to be laid down. Each particular case should, to a great extent, be considered alone and on its own merits.

This Court in the Nebraska cases, Smyth vs. Ames 169 U. S. 464 on page 546 which is quoted in Appellant's brief (p 33) says that the basis of calculation "must be the fair value of the property being used by it for the convenience of the public;" and in order to ascertain which it is proper to consider: the original cost of construction, the present as compared with the original cost, the *probable earning capacity*, etc., and other matters, "and are to be given such weight as may be just and right in each case," and "what the public is entitled to demand is that no more be exacted from it for the use that the services rendered by it are necessarily worth." and on page 54. "The rights of the public would be ignored, if rates for transportation of persons or property on a railroad are exacted without reference to the fair value of the property used for the public,or the fair value of the services rendered, simply that the corporation may meet operating expenses, pay the interest on its obligations, and declare a dividend to stockholders. * * * It cannot be said that a corporation is entitled, as of right, and without reference to the interests of the public to realize a given per cent on its capital stock. * * * The public cannot be subjected to unreasonable rates in order simply that the stockholders may earn a dividend. * * * If a corporation cannot maintain such a highway and earn dividend, it is a misfortune for it and them, which the Constitution does not require to be remedied by imposing unjust burdens upon the public. So the right of the public to use the defendant's turnpike upon payment of such tolls, as in view of the nature of the service rendered by the company are reasonable, is an element in the general inquiry, whether the rates established are unjust and unreasonable."

The California Court has construed the Statute in certain of its provisions two cases of Redlands Water Co. vs. Redlands City, reported 53 Pac. Rep. p. 291, in which it is held that, "on an issue as to the reasonableness of water rates established by ordinance, the items of

necessary expenditures by the water company, should not include interest on the company's indebtedness, nor the sum the plant will depreciate annually, aside from the sum requisite for its maintenance and repairs." Also in the case of the same parties, page 845 of same Report that the income the Company is entitled to receive is not to be determined by the value of the Company's property, "but the value of the service which the public receives is also an element to be determined in considering whether the rates are reasonable," citing the U. S. Supreme Court decisions above.

V.

Reasonableness of Rates.

We shall not go into figures and estimates on the very voluminous testimony to the extent the appellant has done. We shall take it for granted that if the Court holds with us on the constitutional question, and against appellant on the basis of fixing rates on the original cost of the system, it will not disturb the findings of the Court below as to the rates being fair and reasonable, that being a question of fact. Appellant quotes the testimony of the town's attorney (Bf. p. 44) and desires to have it adopted as the sole basis from which the Board acted—Mr. Palmer was detailing the occurences at some committee meeting with the attorney, some of the trustees and some of the Company officials (Rec. 532). It does not appear from the testimony quoted whose estimates the figures were. The attorney cannot tell what was in the minds of the trustees when they acted; but Trustee Routson details fully (Rec. 505 et seq.) the efforts of the Board and some of the elements entering into their deliberations.

In the answers quoted in brief (p. 42) he admitted they "could not give the company a reasonable per cent *on what they claimed their investment was*," and that rates could not be "fixed *in any such basis* for the people could not afford to pay it," and that they did not fix them on that account alone and that they did not think the rates made "would be sufficient to pay the operating expenses, and the expense of maintening the plant, and interest on the Company's debt, and return it a revenue."

Appellant has quoted in full the most favorable testimony to its theory, and that simply shows that the trustees did not think the rates would yield a reasonable income on "what they claimed their investment was," and would not pay operating maintenance, repairs and interest on the debts and leave a balance for profits. And truly it would not, and the law does not require they shonld have so done. Mr. Routson's testimony, we sub nit, shows him to have a better mind for

equity and a truer conception of the proper elements going to fix rates than the able counsel for the appellant. Counsel would have them fixed on the flat basis of original cost, and interest on bonds. The Board took into consideration all receipts from the system, items of maintenance, repairs, the capacity, the amount in use, the number of inhabitants (Rec 509) prior rates that had been fixed, which were entirely satisfactory to the Company, when the Company's officials were on the City Board, and rates the Company had proposed itself (512, 513, 515)and compared the new ordinance with old ones that the Company had prepared, and the increase of rates from 12½ per cent to 25 per cent (522, 527). The fact that the Company was supplying its own lands was never mentioned, nor its land sales (523). In fact everything was more favorable to this Company than the old ordinances, but the Board declined to legislate on the water right question, and the letter of the Statute appeared to agree with them, and the Circuit Court sustained them, and appellant's counsel appear now to be well nigh won over (Brief p. 23). The Board left the Company and the water consumers to wrestle out the proposition of the water right and said in effect, "make your own deals about getting water. Produce your water on one hand and your land on the other and when you get the two together, here's the rate for you."

The complainant has presented no evidence to show from the books of the Company what has been the cost to the Company of maintaining its water system. A substitute for such evidence is contained in Exhibit No. 2, where is shown a statement of cost of maintenance, total $22,534.99, which was made to the Board of Trustees of National City February 20th, 1895. (Rec. 586). That statement was not a transcript from the books of the Company, but the items "are different in some respects, from the charges as made on our general books." (Rec. 137). The explanation of Mr. Boal showed that he had added in the statement charges that were not made in the books, and that some items consisted of his own estimate of what proportion of other charges should be made to the water department, but were not made on the books of the Company.

That statement contained a charge of $10,500.00 interest on bonds outstanding, the proceeds of which had been used in constructing the water system. (Rec. 137). Since the consumers are expected to pay some interest on the value of the dam and pipe system, they have no concern in knowing how the Company procured the money expended in the construction of the system—whether by the sale of lands, stocks or bonds. That money invested in the system calls for some

compensation from them, and the demand for interest upon the bonds requires them to pay interest twice on the same money. Mr. Boal recognized this, and preferring to retain as a charge the interest on bonds, proposed a reduction of the estimated cost of the plant by subtracting the amount of the bonds.

That statement, (Exhibit 2), including as part of the cost of maintenance, a charge for legal expenses, $2,500.00 as to which Mr. Boal estimates: "That one-half charged to the water department would be fair." (Rec. 137.

The whole statement is unsatisfactory. Much is made up of estimates by Mr. Boal, and fails to give the actual cost of maintenance of the water system as shown by the books of the Company, and yet the Board of Trustees is charged with unfairness in failing to take the amount given as correct, and as a fair basis on which to have fixed rates.

We have placed in evidence (Rec. 487) the annual report of the Treasurer of the Company for 1894, which shows:

Expense.....	$2,656.02
Maintenance of Pipe Lines.....	3,505.03
Maintenance of Sweetwater Dam,	1,689.13
Total,.....	$7,850.18

which differs from the statement made in complainant's Exhibit 2 viz.: $22,534.99; and the Treasurer's report is the only evidence given showing from the books of the Company the actual cost of maintenance.

It may be pertinently asked, which should control here, the Treasurer's report made to the stockholders of complainant, or the statement compiled from estimates and suppositions and such portions of the books of the Company as subserve the purpose of including the City Government to yield a return on what the Company sees fit to exact.

We do not think the Court will hesitate to adopt the statement of the Treasurer as to the reasonable annual expense of maintenance, instead of that prepared largely from estimates,and intended to get from the consumers of National City a partial reimbursement for lack of purchasers for the Company's lands.

The evidence shows that the Company commenced business in 1887 with no liabilities except its stock; with 37,894 acres of land (Rec. 377,

530); 17,000 of which had been given to the Santa Fe R. R. Co. by citizens of National City and vicinity as a subsidy and transferred to the Land and Town Company. The testimony also shows that two offices are maintained with two sets of officials; that occasional visits of delegations from Boston are necessary; that the Company sustains a Water Department, Land Department, Horticultural Department with 1,070 acres under cultivation, and is directly responsible for the N. C. & O. Railway (Tr. p. 285.) Thus increasing the expenses for employees and involving the solvency of the Company and its Water Department in the risks attendant upon four kinds of business.

Under these circumstances we submit that consumers if required to pay for annual depreciation in order to provide for future repairs and replacements have no security that such sums will be so applied. And, besides, in view of the Company's practice in the past of charging the cost of repairs in annual expenses, there is danger of taxing the consumer twice on account of so-called annual depreciation.

One item of $15,000, cost of defective pipe that had to be taken up is included (Rec 124) and we are asked to pay an income on it. It was the usual custom to charge cost of replacing such work to maintenance (128). One item of $65,000 was included that had never been put in but was only contemplated or contracted (123). Repairs were charged to expense account (343).

If we accept as correct the observations and calculations of the Company's engineer as to the water supply, which as yet are sustained solely by his own authority, the minimum capacity per annum of the reservoir is 2,443,536,000 gallons. This, if used at the rate first established by the Company, 350,000 gallons per acre, should irrigate 6,980 acres. Other testimony placed the capacity higher but using this amount, the most favorable to the Company, it appears that the system in irrigating some 3,800 acres, is actually employed to the extent of less than four-sevenths of its capacity. The pipe lines have the ability "to supply all the water the Company can store and furnish through its system." (Rec. 86). The system covers 9,953 acres below the 140-foot contour line. It is not the fault of the consumer that the system was constructed on too large a scale for its present service, nor that the company has failed to find customers for all its water and irrigable lands. It may be the misfortune of the Company that three sevenths of the capital invested in its water system is idle capital, but consumers cannot reasonably or at all be held for interest or depreciation on capital that is not being used for their benefit. The Company

must look to future consumers for compensation on this.

The scheme of the Company for irrigation and sale of lands is but one of many plans of the speculative period which have partly or wholly failed, but the water consumers are not responsible legally nor equitably, for the decline in value of the stock, lands and other property of the Company, nor for the latter's failure to realize a profit upon its inflated values. Appellant concedes the system can be duplicated for two thirds its cost (Bf. 48, Rec. 251). Whether the failure in the speculation of building the water system is the result of misfortune or mismanagement, the Company cannot unload the losses upon other property holders in the the City, either by an increase of water rates,or by fixing a charge on water rights basis, something the Board has nothing to do with.

The company conceded that no matter how high rates were fixed, a fair income could not be realized on the investment under the Company's theory, so long as the population served was so limited (Rec. 356), and still they ask this ordinance to be declared invalid, because it did not approximate a little nearer to an admitted impossible condition.

The City for the first four years paid two thirds of the income, and for the next three years one half, (346) although it gets but 22 per cent of the water (360). Have we been unfair?

VI.

Relation of Indebtedness to Rates.

We think the last contention of appellant is sufficiently met by the construction of the Statute by our own Supreme Court since this appeal was taken, in the San Diego and Redlands city cases, as well as earlier ones, cited.

If the contention of basing the rates on the cost is correct, it is practically admitted the bond contention is not good. We cannot see it can make any difference when the cost is only one of many elements' The original cost, the present value, the capacity of and the actual service of the system, the operation, are all elements to be properly considered in getting rates, fair alike to the supplier and taker. It cannot matter whether the Company had its money for the enterprise on hand, made it in land speculation, borrowed it, inherited it, or found it. Let it be considered to its full merits in considering what are reasonable rates, as one among various existing elements and conditions.

Recapitulation.

The State of California did not enact the Constitutional provisions and the statutes complained of, after the appellant had come into the State and made expenditures and acquired rights. It came in 1887 from another state, long after these provisions were a part of our charter and laws, and cannot urge they were aimed at it. It knew their provisions before it came and availed itself of them and it now claims its rights and franchises under them alone; and there is great force in the reasoning of the Circuit Judge that it cannot be heard to claim now the invalidity of those regulations. But if this be not true, we have shown that the State provisions are not unconstitutional and as interpreted by our State Courts afford all protection.

After this brief is in print, the purported substance of a decision of the Circuit Court of Appeals in this circuit is reported in the News telegrams, holding that water rights may be made the subject of contract and establishing a lien therefore, and reversing Judge Ross (Souther and Crosby vs. Flume Co.), but it does not affect this case. The supplier and consumer are simply left to contract with reference to water rights, while the municipality still exercises its prerogative to fix the annual rates.

The true basis of rates may be arrived at by considering the original cost, present value, capacity and proportionate part in actual use, income etc. of the system, as well as the number of consumers and other elements shown to have entered into fixing these rates. The Court below found the rates were reasonable as a fact, and the same rates substantially have been urged by the complainant and adopted from time to time from the foundation of the City up to the introduction of this ordinance; and during which time complainant had a representative on the Board of Trustees of the City; and the rates so urged, adopted and acquiesced in, according to the reports to its stockholders, yielded a profit; consequently it cannot be said they are unreasonable.

The provisions of our State Constitution and Statutes insure equal and uniform rights, protection and obligations; the municipality has not imparied, abridged or suffered them, and it ask an affirmance.

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Irvine Dungan.

Supplemental.

Appellant's supplemental brief has just been served, containing the full text of the opinion in Crosby vs. San Diego Flume Company, Ninth Circuit Court of Appeals. not yet reported. It is not in conflict with our contention on the questions decided. Briefly, it holds that the California Supreme Court has decided that water rights can be bought, sold and contracted about in this State, as the Circuit Court interprets those decisions; and that such contracts are not illegal and void. It says, (p. 7), "The cross bill presents a case of equitable cognigance, if the contract which creates the lien is a valid one, it becomes necessary to determine whether * * * a corporation created for the purpose of appropriating waters of the State, and delivering the same for irrigation, is bereft of the power to enter into contracts with the consumers thereof." And on page 10, that "until water rates are fixed in pursuance of law, the corporation furnishing water, and the consumer receiving it, are left free to make such contracts as they see fit to make, and their agreements will be sustained in the courts." And on (p. 11) quoting the Colorado Case, 17 Pac. 487, (which held under provisions similar to California's "that no water right could be charged in addition to the rates.") "This was held in a case in which no contract had been entered into between the parties to the suit. * * * The corporation had not such title in the water right that it could compel a consumer to buy, and that it could only exact an annual rate for its service in delivering the water."

There is no such contract in this case. The appellee protests it does not want to enter into one, and the appellant asks the Courts to compel it to do so, against its will, upon the questions material in this suit, the decision of the Ninth Circuit Court of Appeals is not against our positions.

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